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MONTANA LEGISLATIVE HISTORY

Chapter 370 Session L 1992
Bill House ____ Senate 231

History and final status sheet x
Introduced bill x
Fiscal note x
Third reading bill x
Final version of bill x

House Committee on Natural Resources
Hearing date(s)* 3/10, 3/12
Executive action (vote) date(s)* 3/12
Comm. Report 3/15
Floor 2nd reading & vote 3/29
Floor 3rd reading & vote 3/31

Senate Committee on Natural Resources
Hearing date(s)* 2/10, 2/13
Executive action (vote) date(s)* 2/13
Comm. Report 2/15
Floor 2nd reading & vote 2/17
Floor 3rd reading & vote 2/18

Conference or Free Conference Comm. ____ Yes x No
Hearing date(s)* _____
Executive action (vote) date(s)* _____

* Includes minutes, exhibits, roll call, visitors register, and vote sheet if available.

Did this bill originate in an interim committee? ____ Yes x No
Committee _____ Report _____

NOTES:

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Compiled by: SJL
Date: 6/20/2016

3/11	HEARING		
3/17	COMMITTEE REPORT—BILL CONCURRED		
3/27	2ND READING CONCURRED	70	24
3/30	3RD READING CONCURRED	69	30
	RETURNED TO SENATE		
4/03	SIGNED BY PRESIDENT		
4/06	SIGNED BY SPEAKER		
4/07	TRANSMITTED TO GOVERNOR		
4/12	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 317		
	EFFECTIVE DATE: 04/12/93		

SB 230 INTRODUCED BY GAGE

REQUIRE NONPARTISAN LOCAL ELECTIONS

1/21	INTRODUCED		
1/21	REFERRED TO LOCAL GOVERNMENT		
1/21	FIRST READING		
1/28	HEARING		
2/10	COMMITTEE REPORT—BILL NOT PASSED		
2/10	ADVERSE COMMITTEE REPORT ADOPTED	37	13

SB 231 INTRODUCED BY YELLOWTAIL

REVISE AND CLARIFY BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO MONTANA WATER USE LAWS

BY REQUEST OF DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

1/21	INTRODUCED		
1/21	REFERRED TO NATURAL RESOURCES		
1/21	FIRST READING		
1/21	FISCAL NOTE REQUESTED		
1/25	FISCAL NOTE RECEIVED		
1/26	FISCAL NOTE PRINTED		
2/10	HEARING		
2/15	COMMITTEE REPORT—BILL PASSED		
2/17	2ND READING PASSED	38	8
2/18	3RD READING PASSED	42	6
	TRANSMITTED TO HOUSE		
2/23	REFERRED TO NATURAL RESOURCES		
2/23	FIRST READING		
3/10	HEARING		
3/15	COMMITTEE REPORT—BILL CONCURRED		
3/29	2ND READING CONCURRED	76	24
3/31	3RD READING CONCURRED	79	20
	RETURNED TO SENATE		
4/07	SIGNED BY PRESIDENT		
4/07	SIGNED BY SPEAKER		
4/13	TRANSMITTED TO GOVERNOR		
4/16	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 370		
	EFFECTIVE DATE: 04/16/93		

SENATE BILL NO. 231

INTRODUCED BY YELLOWTAIL
BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE SENATE

JANUARY 21, 1993	INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES.
	FIRST READING.
FEBRUARY 15, 1993	COMMITTEE RECOMMEND BILL DO PASS. REPORT ADOPTED.
FEBRUARY 16, 1993	PRINTING REPORT.
FEBRUARY 17, 1993	SECOND READING, DO PASS.
FEBRUARY 18, 1993	ENGROSSING REPORT.
	THIRD READING, PASSED. AYES, 42; NOES, 6.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 23, 1993	INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES.
	FIRST READING.
MARCH 15, 1993	COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED.
MARCH 29, 1993	SECOND READING, CONCURRED IN.
MARCH 31, 1993	THIRD READING, CONCURRED IN. AYES, 79; NOES, 20.
APRIL 1, 1993	RETURNED TO SENATE.

IN THE SENATE

APRIL 2, 1993	RECEIVED FROM HOUSE.
	SENT TO ENROLLING.
	REPORTED CORRECTLY ENROLLED.

Senate BILL NO. 231

INTRODUCED BY Yellowtail

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING AND CLARIFYING THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO MONTANA WATER USE LAWS; CLARIFYING THE PROCESS FOR EXTENSION OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE OF A PERMIT; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-307, 85-2-308, 85-2-311, 85-2-312, 85-2-315, 85-2-316, 85-2-402, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

STATEMENT OF INTENT

A statement of intent is required for this bill because 85-2-312 grants the department of natural resources and conservation rulemaking authority to establish a procedure for extending time limits for completing work under a water use permit. The legislature intends that the department provide necessary procedural and substantive safeguards to protect existing water users and permitholders from adverse impacts that may be caused by extending time limits for perfecting new water uses.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"**85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(7) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(7)~~(8) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(8)~~(9) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(9)~~(10) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(10)~~(11) "Ground water" means any water that is beneath the ground surface.

~~(11)~~(12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(12)~~(13) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(13)~~(14) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(14)~~(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "Substantial credible information" means probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(15)~~(17) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(16)~~(18) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(17)~~(19) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other manmade waterways.

~~(18)~~(20) "Water division" means a drainage basin as defined in 3-7-102.

~~(19)~~(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(20)~~(22) "Water master" means a master as provided for in Title 3, chapter 7.

~~(21)~~(23) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-102. (Effective July 1, 1999) Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in

accordance with 85-2-316.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; and

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(6)~~(7) "Declaration" means the declaration of an existing right filed with the department under section 8,

Chapter 452, Laws of 1973.

~~(7)~~(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)~~(9) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(9)~~(10) "Ground water" means any water that is beneath the ground surface.

~~(10)~~(11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(11)~~(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(12)~~(13) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(13)~~(14) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(15) "Substantial credible information" means probable

believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(14)~~(16) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(15)~~(17) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(16)~~(18) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other manmade waterways.

~~(17)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

~~(18)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(19)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

~~(20)~~(22) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-302, MCA, is amended to read:

"**85-2-302. (Temporary) Application for permit -- fee.** (1) Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated.

(2) In addition to the application filing fee

prescribed by the board by rule pursuant to 85-2-113, a person applying for a permit under subsection (1) shall pay a fee of $1 per acre-foot of ground water appropriated. The fees collected by the department under this subsection must be deposited in the ground water assessment account, established in 85-2-905, within the state special revenue fund. (Terminates July 1, 1993--sec. 22, Ch. 769, L. 1991.)

85-2-302. (Effective July 1, 1993) Application for permit. Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a

further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated."

Section 3. *Section 85-2-307, MCA, is amended to read:*

"**85-2-307. Notice of application.** (1) (a) Upon receipt of a ~~proper~~ correct and complete application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice once in a newspaper of general circulation in the area of the source.

(b) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

(c) The department may, in its discretion, also serve notice upon any state agency or other person the department

feels may be interested in or affected by the proposed appropriation.

(d) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than 15 days or more than 60 days after the date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

Section 4. Section 85-2-308, MCA, is amended to read:

"**85-2-308. Objections.** (1) (a) An objection to an application for a permit must be filed by the date specified by the department under 85-2-307(2).

(b) The objection to an application for a permit must state the name and address of the objector and facts tending to show that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the

objector and facts tending to show that one or more of the criteria in 85-2-402 are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts tending to show that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall timely file a correct and complete objection on a form prescribed by the department."

Section 5. Section 85-2-311, MCA, is amended to read:

"**85-2-311. Criteria for issuance of permit.** (1) Except as provided in subsections (2) and (3), the department shall issue a permit if the applicant proves by ~~substantial credible~~ a preponderance of evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

(i) the existing demands on the state water supply, as

well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are

not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) To meet the ~~substantial credible~~ preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit ~~independent~~ hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies~~, demonstrating that the criteria are met~~.

(5) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or

assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 6. Section 85-2-316, MCA, is amended to read:

"**85-2-316. Reservation of waters.** (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at periods or for a length of time as the board designates.

(2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved, as described by the following basins:

(i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(iv) the Little Missouri River and its tributaries to

its confluence with Lake Sakakawea in North Dakota;

(v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

(b) A water reservation may be made for an existing or future beneficial use outside the basin where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and the proposed use would occur in a basin designated in subsection (2)(a).

(3) Upon receiving ~~an~~ a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement must be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

(4) (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction

of the board by a preponderance of evidence:

(i) the purpose of the reservation;

(ii) the need for the reservation;

(iii) the amount of water necessary for the purpose of the reservation;

(iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the board shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a reservation to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, use, and reservation of water.

(5) If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board by a preponderance of evidence that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(6) The board shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the board.

(7) After the adoption of an order reserving waters, the department may reject an application and refuse a permit

for the appropriation of reserved waters or may, with the approval of the board, issue the permit subject to terms and conditions it considers necessary for the protection of the objectives of the reservation.

(8) (a) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for the use with the district, and the district, upon approval of the application, shall inform the department of the approved use and issue the applicant an authorization for the use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

(b) Upon actual application of water to the proposed beneficial use the authorized user shall notify the

conservation district. The notification must contain a certified statement by a person with experience in the design, construction, or operation of project works for agricultural purposes ~~that~~ describing how the reserved water ~~has--been~~ was put to use ~~in-substantial-accordance-with-the terms-and-conditions-of-the-authorization--to--use--reserved water~~. The department or the district may then inspect the appropriation to determine if it has been completed in substantial accordance with the authorization.

(9) Except as provided in 85-2-331, the priority of appropriation of a water reservation and the relative priority of the reservation to permits with a later priority of appropriation must be determined according to this subsection (9).

(a) A reservation under this section has a priority of appropriation dating from the filing with the department of a notice of intention to apply for a water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a reservation.

(b) Upon receiving a notice of intention to apply for a water reservation, the department shall identify all potential water reservation applicants in the basin specified in the notice and notify each potential applicant

of the opportunity to submit an application and to receive a reservation with the priority of appropriation as described in subsection (9)(a).

(c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit a correct and complete water reservation application within 1 year after the filing of the notice of intention to apply. Upon a showing of good cause, the board may extend the time for preparing the application.

(d) The board may by order subordinate a water reservation to a permit issued pursuant to this part if:

(i) the permit application was accepted by the department before the date of the board order granting the reservation; and

(ii) the effect of subordinating the reservation to one or more permits does not interfere substantially with the purpose of the reservation.

(e) The board shall by order establish the relative priority of reservations approved under this section that have the same day of priority. A reservation may not adversely affect any rights in existence at that time.

(10) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board

may extend, revoke, or modify the reservation. Any undeveloped water made available as a result of a revocation or modification under this subsection is available for appropriation by others pursuant to this part.

(11) The board may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate the reservation or portion of the reservation to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date of the reservation, and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

(12) A reservant may not make a change in a reservation under this section except as permitted under 85-2-402 and this subsection. If the department approves a change, the board, upon notification by the department of its approval,

shall give notice and require the reservant to establish that the criteria in subsection (4) will be met under the approved change.

(13) A reservation may be transferred to another entity qualified to hold a reservation under subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs upon the filing of a water right transfer certificate with the board together with an affidavit from the entity receiving the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity agrees to comply with the requirements of this section and the conditions of the reservation, and that the entity can meet the objectives of the reservation as granted. If the transfer of a reservation involves a change in an appropriation right, the necessary approvals must be acquired pursuant to subsection (12).

(14) Nothing in this section vests the board with the authority to alter a water right that is not a reservation.

(15) The department shall undertake a program to educate the public, other state agencies, and political subdivisions of the state as to the benefits of the reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical assistance to other state agencies and political subdivisions in applying for reservations under this section.

(16) Water reserved under this section is not subject to the state water leasing program established under 85-2-141."

Section 7. Section 85-2-402, MCA, is amended to read:

"85-2-402. (Temporary) Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except, as permitted under this section, ~~and with~~ by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by ~~substantial--credible~~ a preponderance of evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest,

in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by ~~substantial--credible~~ a preponderance of evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are

not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the

proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that a change might adversely affect the rights of other persons.

(7) The department or the legislature, if applicable, may approve a change subject to terms, conditions,

restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(8) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been ~~properly~~ completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works ~~that~~ describing how the appropriation ~~has-been-properly~~ was completed ~~in--substantial--accordance--with--the--terms--and conditions-of-the-change-approval~~.

(9) If a change is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(10) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(11) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(12) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-402. (Effective July 1, 1999) Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except, as permitted under this section, ~~and with~~ by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by ~~substantial--credible~~ a preponderance of evidence that the following criteria are

met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by ~~substantial credible~~ a preponderance of evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as

well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after

one or more public hearings.

(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not

otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and

5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

(7) The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(8) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been ~~properly~~ completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works ~~that~~ describing how the appropriation ~~has-been-properly~~ was completed ~~in--substantial--accordance--with--the--terms--and conditions-of-the-change-approval~~.

(9) If a change is not completed as approved by the

department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(10) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(11) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(12) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 8. Section 85-2-436, MCA, is amended to read:

"85-2-436. (Temporary) Water leasing study. (1) The

department of fish, wildlife, and parks and the department, in consultation with the water policy committee, shall conduct and coordinate a study that, at a minimum:

(a) provides the following data for each designated stream reach and each pilot lease entered into under subsection (2):

(i) the length of the stream reach and how it is determined;

(ii) technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;

(iii) legal standards and technical data used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;

(iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering; and

(v) methods and technical means used to monitor use of water under each lease;

(b) based on the data provided under subsection (1)(a), develops a complete model of a water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.

(2) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of

fish, wildlife, and parks and the department may engage in the activities described in this subsection. For purposes of this study, this section is the exclusive means by which the department of fish, wildlife, and parks may seek to change an appropriation right to an instream flow purpose.

(a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream reaches determined eligible by the board pursuant to 85-2-437.

(b) Upon receipt of ~~an~~ a correct and complete application for a lease from the department of fish, wildlife, and parks, the department shall publish notice of the application as provided in 85-2-307. Parties who believe they may be adversely affected by the proposed lease may file an objection as provided in 85-2-308. A lease may not be approved until all objections are resolved. After resolving all objections filed under 85-2-308, the department shall authorize a lease of an existing right for the purpose of maintaining or enhancing streamflows for the benefit of fisheries if the applicant submits a correct and complete application and meets the requirements of 85-2-402.

(c) The application for a lease authorization must include specific information on the length and location of the stream reach in which the streamflow must be maintained

or enhanced and must provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow must be measured.

(d) The maximum quantity of water that may be leased is the amount historically diverted by the lessor. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows below the lessor's point of diversion.

(e) The lease may not be issued for a term of more than 10 years, but it may be renewed once for up to 10 years, except that a lease of water made available from the development of a water conservation or storage project is restricted to a term of not more than 20 years. Upon receiving notice of a lease renewal, the department shall notify other appropriators potentially affected by the lease and shall allow 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is not required for a renewal unless an appropriator other than an appropriator described in subsection (2)(i) submits evidence of adverse effects to ~~his~~ the appropriator's rights that has not been considered previously. If new evidence is submitted, a lease authorization must be obtained according to the requirements of 85-2-402.

(f) During the term of the lease, the department may

modify or revoke the lease authorization if an appropriator other than an appropriator described in subsection (2)(i) proves by ~~substantial credible~~ a preponderance of evidence that ~~his~~ the appropriator's water right is adversely affected.

(g) The priority of appropriation for a lease under this section is the same as the priority of appropriation of the right that is leased.

(h) Neither a change in appropriation right nor any other authorization is required for the reversion of the appropriation right to the lessor's previous use.

(i) A person issued a water use permit with a priority of appropriation after the date of filing of an application for a lease authorization under this section may not object to the exercise of the lease according to its terms or the reversion of the appropriation right to the lessor according to the lessor's previous use.

(j) The department of fish, wildlife, and parks shall pay all costs associated with installing devices or providing personnel to measure streamflows according to the measuring plan submitted under this section.

(3) (a) The department of fish, wildlife, and parks shall complete and submit to the board, commission, and water policy committee an annual study progress report by December 1 of each year. This report must include the

applicable information listed in subsection (1) for each lease. If the department of fish, wildlife, and parks has not leased water rights under this section by December 1 of any year, the department of fish, wildlife, and parks shall provide compelling justification for that fact in the study progress report.

(b) A final study report must be adopted by the board and commission and submitted to the water policy committee, which shall complete the final report by December 1, 1998.

(4) This section does not create the right for a person to bring suit to compel the renewal of a lease that has expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)"

Section 9. Section 85-2-312, MCA, is amended to read:

"**85-2-312. Terms of permit.** (1) The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311, and it may issue temporary or seasonal permits. A permit shall be issued

subject to existing rights and any final determination of those rights made under this chapter.

(2) The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. The department shall issue the permit or authorized extension of time subject to the terms, conditions, restrictions, and limitations it considers necessary to ensure that the work on the appropriation is commenced, conducted, and completed and that the water is actually applied in a timely manner to the beneficial use specified in the permit.

~~(3) The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the~~

~~expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party. The department may grant the extension of time in the absence of a hearing if no requests for a hearing are received and the extension of time is granted as requested, or the department may grant the extension of time in a modified form by following the process established in 85-2-310(2). Subsequent extensions of time may be made in the same manner.~~ The department shall by rule or by condition to a permit establish a process allowing for the extension of the time limits specified in the permit for commencement of the appropriation works, completion of

construction, and actual application of water to the proposed beneficial use. The department may not accept a request for extension of time that is filed less than 30 days prior to the time limit specified in the permit. If a permit is not completed within the time limit specified or within an extension of that time limit the permit is void upon lapse of the time limit.

(4) The original of the permit shall be sent to the permittee, and a copy shall be kept in the office of the department in Helena."

Section 10. Section 85-2-315, MCA, is amended to read:

"85-2-315. Certificate of water right. Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been ~~properly~~ completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works ~~that~~ describing how the appropriation ~~has--been~~ was ~~properly~~ completed ~~in-substantial-accordance with-the-terms-and-conditions-of-the-permit~~. The department shall review the certified statement and may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be

sent to the permittee, and a duplicate shall be kept in the office of the department in Helena."

NEW SECTION. **Section 11.** Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 12.** Retroactive applicability. [Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] that are subject to the provisions of Title 85, chapter 2.

NEW SECTION. **Section 13.** Effective date. [This act] is effective on passage and approval.

-End-

STATE OF MONTANA - FISCAL NOTE
Form BD-15
In compliance with a written request, there is hereby submitted a Fiscal Note for SB0231, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION: The bill proposes to revise and clarify portions of ten separate water law sections concerning the burdens of proof under which applications for beneficial water use permits, change authorizations, and reservations are processed pursuant to Montana water use laws. It also clarifies the process for extension of time for a water use permittee to complete permit and change authorization conditions, and the verification process for issued permit and change authorizations.

ASSUMPTIONS:

1. The present filing fee for an Application for Extension of Time (Form No. 607) is $70. Board Rule 36.12.103(1)(f) states $20 is specifically for publication costs.
2. During 1990, 1991, and 1992 the Department of Natural Resources and Conservation (DNRC) received 226 Applications for Extension of Time, for a three-year average of 75 per year.
3. This proposed bill would eliminate the requirement that Applications for Extension of Time be public noticed. Therefore on the average per year DNRC would realize a reduction in Form No. 607 fees of $1,500. (75 applications x $20 = $1,500)
4. During 1990, 1991, and 1992 DNRC spent a total of $3,882 to public notice the 226 Applications for Extension of Time for a three-year average of $17 per application. Therefore, on the average per year, DNRC spent $1,275 to public notice 75 applications. (75 applications x $17 = $1,275)
5. The difference between publication fees received and actual costs on an average per year equals $225. ($1,500 - $1,275 = $225).
6. DNRC would be required to revise Board Rule 36.12.103(1)(f), to eliminate the $20 fee specifically required to public notice Applications for Extension of Time. However, the $50 fee for processing the application would remain.
7. DNRC would also be required to revise and republish five separate forms if the above proposed amendment should pass.
8. The costs of amending board rules and revising and republishing rules would be absorbed.

FISCAL IMPACT:

On an average year DNRC would lose $1,500 in (Form No. 607) fees for public noticing. However, DNRC would not be required to spend an average $1,275 per year to public notice the Applications for Extension of Time, for a net revenue loss of $225 per year.

Dave Lewis 1-25-93
DAVID LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Wm Yellowtail 1/26/93
BILL YELLOWTAIL, PRIMARY SPONSOR DATE

Fiscal Note for SB0231, as introduced

SB 231

MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chair Bianchi, on February 10, 1993, at 1:00 p.m.

ROLL CALL

Members Present:
Sen. Don Bianchi, Chair (D)
Sen. Bob Hockett, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Ed Kennedy (D)
Sen. Bernie Swift (R)
Sen. Chuck Swysgood (R)
Sen. Henry McClernan (D)
Sen. Larry Tveit (R)
Sen. Cecil Weeding (D)
Sen. Jeff Weldon (D)

Members Excused: None.

Members Absent: None.

Staff Present: Paul Sihler, Environmental Quality Council
Leanne Kurtz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	SB 231, SB 248, SB 296
Executive Action:	SB 248
Executive Session:	SB 231, SB 102

HEARING ON SB 296

Opening Statement by Sponsor:

Senator Grosfield, Senate District 41 stated SB 296 was drafted at the request of the Department of Natural Resources and Conservation (DNRC) and resulted from the state water planning process over the last biennium. He supplied the Committee with a copy of the Montana Water Plan (Exhibit #1). He stated SB 296 would deal with a small area of the Water Plan and referred to

Closing by Sponsor:

Senator Grosfield closed on SB 296 emphasizing the well drillers were not ignored. He stated the Steering Committee drafted SB 296 through a consensus process and there was a well driller on the Committee. Sen. Grosfield said SB 296 clarifies the authority of the Board to put a driller on notification and allows the Board random notification which would ensure good water well construction. He stated the rules are to be passed by the BWWCA.

HEARING ON SB 231

Opening Statement by Sponsor:

Senator Yellowtail, Senate District 50 stated SB 231 addressed the burden of proof on the objector to a permit as well as the burden on the applicant. He stated SB 231 clarifies definitions in the current statute and establishes the relative burden on the applicant and the objector. He stated SB 231 would clarify the process of acting on requests for extensions of time for completing permit and change authorization conditions. SB 231 will also allow the Department to determine by rule rather than by hearing if due diligence is being exercised. He stated SB 231 will facilitate the certification of the ground water use by allowing consultants to verify or document how the water was developed. SB 231 would allow DNRC to specify the substance of the field report that needs to be prepared.

Proponents' Testimony:

Dan McIntyre, Department of Natural Resources and Conservation (DNRC) read from prepared testimony (Exhibit #5).

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

Senator Grosfield asked Mr. McIntyre how long completion of a project takes. Mr. McIntyre stated the times vary depending on the project. He said the time to ask for an extension is 30 days before the original finish date of a project. Senator Grosfield asked Mr. McIntyre about extenuating circumstances which would not allow for the 30 day period for requesting an extension. Mr. McIntyre answered that there are allowances for conditions rather than through rule making by the agency.

Senator Swysgood asked Mr. McIntyre if the Department would review the appropriations and determine whether they are in compliance with the permit and if a fee would be charged. Mr. McIntyre said the statement of intent with respect to rule making applied only the section of the law dealing with extensions of time. He stated no fee will be charged to any permittee or on their filing of notice of completion. Senator Swysgood asked if the physical inspection of the site would make charging a fee feasible. Mr. McIntyre stated no.

Senator Weeding asked Mr. McIntyre if a permit was for 5 years, and a person had done no work on the permit and filed for an extension, would that person still get an extension. Mr. McIntyre stated "due diligence must be shown" and there is a requirement for that. Mr. McIntyre added it is possible for second extensions.

Closing by Sponsor:

Senator Yellowtail closed on SB 231.

HEARING ON SB 248

Opening Statement by Sponsor:

Senator Yellowtail, Senate District 50 stated SB 248 would clarify MCA 82-4-224 and repeal the requirement of the surface owner of property consent the commencement of strip mining operations by the owner of the mineral estate.

Proponents' Testimony:

Greg Petesch, Code Commissioner stated SB 248 would conform MCA with court decisions. He stated in Western Energy v. Genie Land Company, 1987 (Mont), the Montana Supreme Court struck the statute on the basis that "it was taking private property without due process" and "it was impairment of the contract which had been introduced when the mineral estate had been severed from the surface estate". He stated SB 248 would clarify MCA 82-4-224 and make the mineral estate the dominant estate.

Jim Mockler, Montana Coal Council, expressed support of SB 248.

John North, Department of State Lands, supported SB 248 and stated it is in compliance with federal law.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

Senator Weeding asked Mr. Petesch what effect SB 248 would have on the federal flood plain (alluvial fan). Mr. Pettish stated SB 248 would have no impact on the federal legislation. He stated SB 248 stipulates the surface owner could not, by with holding consent, stop the mineral owner from mining.

Closing by Sponsor:

Senator Yellowtail closed on SB 248, noting the statute had to be changed despite personal feelings on the case.

EXECUTIVE ACTION ON SB 248

MOTION/Vote:

Senator Weeding moved SB 248 DO PASS.

Discussion:

Senator Doherty stated he disagreed with the Supreme Court's judgement. He stated SB 248 would give the coal companies the right of eminent domain and private property owners should not be condemned by a profit corporation.

Vote:

MOTION CARRIED 10 TO 3 with Senator Hockett, Senator Tveit and Senator Doherty voting NO.

EXECUTIVE ACTION ON SB 231

Motion:

Senator Hockett moved SB 231 DO PASS.

Discussion:

Senator Grosfield asked Paul Sihler to clarify the change of language from "substantial credible evidence" to "preponderance of" and if the terms meant the same. Mr. Sihler stated he believed that was true, but would have to check in to the legal standards for burden of proof.

Senator Hockett agreed with Senator Grosfield. Mr. Sihler stated the language was to clarify the "preponderance of evidence".

Senator Bianchi stated "substantial credible" was defined on page 4.

Senator Swysgood stated he wants a definition of "preponderance of evidence" before acting on SB 231.

Senator Hockett withdrew his motion.

EXECUTIVE ACTION ON SB 102

Discussion:

Senator Grosfield supplied amendments to SB 102 (Exhibit #6) in an effort to move SB 102 off the table. The amendments were explained to the Committee by Senator Grosfield. There was some opposition to the amendments. No executive action was taken.

ADJOURNMENT

Adjournment: 2:50 p.m.

Don Bianchi
SENATOR DON BIANCHI, Chair

Leanne Kurtz
LEANNE KURTZ, Secretary

DB/lk

ROLL CALL

SENATE COMMITTEE Natural Resources DATE 2/10/93

NAME	PRESENT	ABSENT	EXCUSED
Sen. Bianchi	✓		
Sen. Hockett	✓		
Sen. Bartlett	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Keating	✓		
Sen. Kennedy	✓		
Sen. Swift	✓		
Sen. Suvsgood	✓		
Sen. McClernan	✓		
Sen. Tveit	✓		
Sen. Weeding	✓		
Sen. Weldon	✓		

FC8

Attach to each day's minutes

TESTIMONY OF THE
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
ON SENATE BILL 231, FIRST READING

BEFORE THE SENATE NATURAL RESOURCES COMMITTEE

FEBRUARY 10, 1993

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO MONTANA WATER LAWS; CLARIFYING THE PROCESS FOR EXTENSION OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE OF A PERMIT."

The Montana Department of Natural Resources and Conservation supports this legislation revising the Montana Water Use Act to clarify three basic administrative issues -- burdens of proof, extensions of time, and permit verification.

The first issue addressed by the legislation is that of clarifying the burdens of proof used in making decisions on applications for water use permits, changes in appropriation rights, and water reservations. This is accomplished by first defining what is meant by a "*correct and complete*" application. That is, an application in which all the blanks are filled in and the information supplied is considered a sufficient body of facts to cause the department to believe that the requested action should occur. The legislation goes on to require the submission of correct and complete applications for the various water filings involved -- permits, changes, and reservations as well as leases and objections.

Currently, and although the law requires the application of a "*substantial credible evidence*" standard, the department uses the "*preponderance of evidence*" standard when acting under the Water Use Act. This may be attributed to the fact that the substantial credible evidence standard is generally looked upon as a review standard -- one used by an appellate court when reviewing decisions of a lower court or administrative body. In contrast, the more appropriate preponderance of evidence standard is an evidentiary standard used by administrative decision-makers when weighing competing and contradictory evidence. Senate Bill 231 removes this confusing language regarding decision-making under the law by inserting the term "*preponderance of evidence*" in lieu of the current "*substantial credible evidence.*"

The final matter pertaining to the burden of proof issue concerns the evidence needed by an applicant to meet its burden to persuade the department that the criteria for issuance have been met. Although the law states the types of information needed,

SENATE NATURAL RESOURCES
EXHIBIT NO. 5
DATE 2/10/93

it is confusing in its use of the term "*independent*" evidence. As presently interpreted, it means an applicant has to generate new and independent evidence even though existing information available from the department or other sources is perfectly acceptable. Senate Bill 231 addresses this matter by deleting the term "*independent*" and restructuring the subsection involved.

The second administrative matter addressed by this legislation concerns requests for extensions of time to comply with the conditions on permit and change authorizations. Senate Bill 231 provides for more efficient handling of requests for extensions of time through a process defined by rule rather than the present statutory mechanism. Consistent with the need to assure that the due process rights of existing water users are adequately safeguarded, it would allow the department to develop a process that provides more flexibility and efficiency in dealing with time extension requests. As an example, rather than provide notice by means of newspaper publication as now required by law, the department could individually notice only those parties having a potential concern with a time extension request. The proposed amendment would also reduce the need for extenuated hearings by establishing standards for what constitutes "*due diligence*" in putting permitted water to use. This might involve setting forth specific conditions on new permit or change authorizations that specify how any subsequent time extension requests would be handled. In doing so, it would advise all water right holders on a stream of the criteria the department will use in acting on requests for time extensions. In turn, this would eliminate the need to re-notice the action at the time any such request is actually made and reduce the need for extenuated hearings.

The third and final focus of this legislation is the process for verifying if the terms and conditions of a permit or change authorization have been met. Currently, the statute allows parties other than the department to certify if on-the-ground water use is in "*substantial compliance*" with a permit or change authorization. However, the ultimate determination of substantial compliance must be made by the department. Senate Bill 231 addresses the matter by continuing to allow outside parties to conduct the field verification effort. But, rather than assess the matter of substantial compliance, they would certify or document what has taken place on the ground. In turn, the department would use this information to determine if the use is in substantial compliance with the authorization. Along with this amendment, the legislation will also allow the department to use current rule making authority to specify the substance of the field report that needs to be prepared and thereby better assure that qualified persons prepare the needed documentation.

DATE 2/10

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: SB 231, SB 248, SB 296

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Wesley Lindsay	Water Well Board	SB 296		X
Daniel Nelson	Egge Drilling/Livingston Water Well Driller	SB 296		X
Curtis Carlson	Carlson Drilling	SB 296		X
Jim Mockler	MT. Coal Council	SB 248	✓	
Pat Byrne	MT Board Water Well Contr	296		X
Dan McGee	DNRC	231	✓	
Terry Lindsay	MWWDA	296		✓
Curt Schelle	American Drilling	296		✓
Wm. Kipfner	Rock Creek Drilling	296		✓
Rick Byrne	MWWDA Pat Byrne Drilling	296		✓
Susan Sensen	American Drilling	296		X
Tony Jennings	MWWDA & Jennings Drilling	296		X
Jacqueline J. Leamaster	MT Water Well Drillers Assoc	296		X
Robert Ellis	MT Audubon	231, 296	✓, ✓	
Kevin Haggerty	Haggerty Drilling Bozeman	296		✓
STEVE HANSEN	HANSEN ENT. DRILLING GLASGOW	296		X
Funder Lindsay	Lindsay Drilling Agency	296		✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

F10

MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chair Bianchi, on February 13, 1993, at 10:45 a.m.

ROLL CALL

Members Present:

Sen. Don Bianchi, Chair (D)
Sen. Bob Hockett, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Ed Kennedy (D)
Sen. Bernie Swift (R)
Sen. Chuck Swysgood (R)
Sen. Henry McClernan (D)
Sen. Larry Tveit (R)
Sen. Cecil Weeding (D)
Sen. Jeff Weldon (D)

Members Excused: None.

Members Absent: None.

Staff Present: Paul Sihler, Environmental Quality Council
Leanne Kurtz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 334, SB 319, SB 284
Executive Action: SB 171, SB 296, SB 339, SB 231

HEARING ON SB 334

Opening Statement by Sponsor:

Senator Tom Beck, SD 24, said SB 334 creates a waste and pesticide container disposal program. He said annual fees for commercial and farm applicators will be increased in order to fund the program. Sen. Beck said the Department of Agriculture would administer the six year program. He distributed two sets of amendments (Exhibit #1 and #2). and discussed the sections of the bill. Sen. Beck said there may be controversy over Section

SB017101.PCS).

Discussion:

Senator Doherty said the language mirrors language in the Constitution which says that once information is given to a public agency, it is public information unless the demand for individual privacy clearly exceeds the merits of public disclosure. He added the language gives direction to the DSL commissioner regarding legislative intent on individual privacy concerns.

Senator Grosfield asked for clarification on the amendments passed so far. Mr. Sihler explained the amendments. Senator Grosfield asked if SB 171 as amended would affect types of individual privacy other than competitively sensitive and proprietary geological information. Sen. Doherty stated the mining companies had concerns with disclosure of information ("trade secrets") that they spent money and time gathering.

Vote:

The motion to AMEND SB 171 CARRIED with Sen. Tveit, Sen. Swysgood, Sen. Keating, and Sen. Swift voting NO.

Motion:

Senator Doherty MOVED SB 171 DO PASS AS AMENDED.

Discussion:

Senator Hockett said the original bill had little or no opposition and expressed concern that SB 171 as amended may not be acceptable.

Vote:

The Do Pass As Amended motion CARRIED 9 to 4 with Sen. Keating, Sen. Swift, Sen. Swysgood, and Sen. Tveit voting NO.

EXECUTIVE ACTION ON SB 231

Motion:

Senator Grosfield MOVED SB 231 DO PASS.

Discussion:

Senator Grosfield said he received a note from Don McIntyre, DNRC legal counsel, describing preponderance of evidence (Exhibit #18).

Vote:

The Do Pass motion CARRIED with Sen. Swysgood and Sen. Keating voting NO.

EXECUTIVE ACTION ON SB 296

Motion:

Senator Grosfield MOVED SB 296 DO PASS.

Discussion:

Senator Grosfield stated he served as chairman of the state Water Planning Advisory Council and SB 296 is one of the bills that came out of the process. He distributed a handout from DNRC addressing concerns expressed in the hearing (Exhibit #19).

Senator Hockett said he is on the long range planning committee which reviews all the applications for money to correct water and sewage problems. He said as areas like Ravalli and Flathead counties become more congested, well drilling becomes more complicated.

Referring to page 3, line 11, Senator McClernan asked what "recently" means. Senator Grosfield said the language is rulemaking authority for the Board of Water Well Contractors, and they can define "recently" however they want. He added he does not know if a time frame has been discussed.

Senator Swysgood said testimony indicated there were few violations, and wondered how many of the violators were out of state drillers. He said he does not believe SB 296 is necessary.

Senator Tveit said the bill gives DNRC the authority to "do alot of snooping", and he asked Wes Lindsay what his main concern is regarding SB 296. Mr. Lindsay said the Board has already adopted rules regarding drillers known to have recently violated construction standards. He added violators are currently on probation for having violated the standards and the drillers object to the "new part" of the bill.

Vote:

ROLL CALL

SENATE COMMITTEE Natural Resources DATE 2/13/93

NAME	PRESENT	ABSENT	EXCUSED
Sen. Bianchi	X		
Sen. Hockett	X		
Sen. Bartlett	X		
Sen. Doherty	X		
Sen. Grosfield	X		
Sen. Keating	X		
Sen. Kennedy	X		
Sen. Swift	X		
Sen. Suvsgood	X		
Sen. McClernan	X		
Sen. Tveit	X		
Sen. Weeding	X		
Sen. Weldon	X		

FC8

Attach to each day's minutes

SENATE STANDING COMMITTEE REPORT

February 13, 1993

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration Senate Bill No. 231 (first reading copy -- white), respectfully report that Senate Bill No. 231 do pass.

Signed: Don Bianchi
Senator Don Bianchi, Chair

M- Amd. Coord.
___ Sec. of Senate

361420SC.Sma

NATURAL RESOURCES
EXHIBIT NO. 14
DATE 2/13
BILL NO. SB 231

Burden of proof has essentially two elements as explained below:

BURDEN OF PROOF

The burden of proof embodies two concepts as an evidentiary standard: (1) the burden of production -- the burden of going forward with evidence to convince the decision maker that you should be believed; and,

(2) the burden of persuasion -- the burden of convincing the decision maker that you should ultimately win the case because your evidence meets the requisite standard of proof.

NOTE: The burden of production shifts from one party to the other depending on whose duty it is to present the evidence [for example, once a plaintiff has completed his case the burden shifts to the defendant to produce evidence to establish the defense]. The burden of persuasion never shifts [for example, the plaintiff is required to convince the judge by some set standard (see standards below) that he should prevail, if he doesn't meet the standard the plaintiff loses].

In modern judicial proceedings, three standards of proof are recognized:

(1) preponderance of the evidence -- this standard is used in most every civil case [evidence which, when fairly considered produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition, but does not necessarily mean the greater number of witnesses];

(2) clear and convincing evidence -- this standard is reserved to protect particularly important interests in a limited number of civil cases [a high standard requiring strong evidence that produces in the mind of the court a firm belief or conviction, but is less than conclusive]; and,

(3) beyond a reasonable doubt -- this standard is used exclusively in criminal cases [Highest standard of proof].

Confusion exists in the Montana water law because the standard "substantial credible evidence" is used. Terms such as substantial and substantial credible are generally terms used by a reviewing court. For example, the Montana Supreme Court reviews decisions of a district court and upholds the district court if there exists substantial evidence in the record of the district court to uphold the decision. Remember, however, that the district court in making its decision used the standard of a preponderance of the evidence (in most civil cases). The standards of substantial credible and preponderance of the evidence serve two different functions-- substantial credible to review a case on appeal, and preponderance to weigh the conflicting evidence by the initial decision maker. Unfortunately, the standard for the decision maker in the water laws has been set as "substantial credible" (the reviewing

standard) therefore, the question naturally arises as to whether substantial credible is higher or lower than preponderance of the evidence. It appears that arguments may be made on both sides of the issue, but the department in dealing with the issue in water permitting matters is utilizing "preponderance of evidence" as being embodied in the "substantial credible" standard.

53rd LEGISLATIVE SESSION

NATURAL RESOURCES COMMITTEE

I, Senator John Ed Kennedy Jr. do hereby submit my vote to Chairman Bianchi as follows:

BILL NUMBER SB 231

MOTION

Do Pass

Yes X unless amended - if amendments are ok & Sponsor & still vote yes No

Do Not Pass

Yes No

Indefinitely Postponed

Yes No

Tabled

Yes No

John Ed Kennedy Jr.
Signature

2-13-93
Date

53rd LEGISLATIVE SESSION

NATURAL RESOURCES COMMITTEE

I, Senator KEATING do hereby submit my vote to Chairman Bianchi as follows:

BILL NUMBER SB 231

MOTION

Do Pass
Yes_____ No X

Do Not Pass
Yes X No_____

Indefinitely Postponed
Yes_____ No_____

Tabled
Yes_____ No_____

Keating
Signature

2-13-93
Date

Nays: Aklestad, Bartlett, Beck, Devlin, Doherty, Forrester, Franklin, Gage, Halligan, Jacobson, Lynch, McClernan, Pipinich, Stang, Swift, Swysgood, Tveit, Wilson, Mr. President.
Total 19

Paired: Christiaens, Aye; Wilson, No.

Absent or not voting: None.
Total 0

Excused: None.
Total 0

SECOND READING OF BILLS
(COMMITTEE OF THE WHOLE)

Majority Leader Jergeson moved that the Senate resolve itself into the Committee of the Whole for consideration of business on second reading. Motion carried unanimously. Senator Swift in the Chair.

Mr. President: We, your Committee of the Whole, having had under consideration business on second reading, recommend as follows:

SB 178 - Senator Brown moved that SB 178 be amended as follows:

1. Title, lines 6 and 7.
Following: "SUPERINTENDENTS;" on line 6
Strike: remainder of line 6 through "TREASURER;" on line 7

Amendment adopted unanimously.

Senator Brown moved that SB 178 do pass. Motion carried unanimously.

SB 222 - Senator Fritz moved that SB 222 do pass. Motion carried as follows:

Yeas: Bartlett, Bianchi, Blaylock, Brown, Burnett, Christiaens, Doherty, Eck, Forrester, Franklin, Fritz, Gage, Hager, Halligan, Hockett, Jacobson, Jergeson, Klampe, McClernan, Mesaros, Pipinich, Stang, Towe, Vaughn, Waterman, Weeding, Weldon, Yellowtail, Mr. President.
Total 29

Nays: Aklestad, Beck, Bruski-Maus, Crippen, Devlin, Grosfield, Harding, Harp, Hertel, Keating, Kennedy, Kochnke, Lynch, Nathe, Rea, Rye, Swift, Swysgood, Toews, Tveit.
Total 20

Absent or not voting: None.
Total 0

Excused: Wilson.
Total 1

SB 231 - Senator Yellowtail moved that SB 231 do pass. Motion carried as follows:

Yeas: Aklestad, Bartlett, Bianchi, Blaylock, Brown, Christiaens, Crippen, Doherty, Eck, Franklin, Gage, Grosfield, Hager, Halligan, Harding, Harp, Hertel, Hockett, Jacobson, Jergeson, Keating, Kennedy, Klampe, Lynch, McClernan, Mesaros, Pipinich, Rea, Stang, Swift, Toews, Towe, Tveit, Vaughn, Waterman, Weldon, Yellowtail, Mr. President.
Total 38

Nays: Beck, Bruski-Maus, Burnett, Devlin, Forrester, Koehnke, Nathe, Swysgood.
Total 8

Absent or not voting: Fritz, Rye, Weeding.
Total 3

Excused: Wilson.
Total 1

SB 264 - Senator Van Valkenburg moved that SB 264 be amended as follows:

1. Title, line 7.
Strike: "IMPRISONMENT"
Insert: "JAIL"

2. Page 1, line 13.
Following: "~~release~~"
Insert: "or release"

3. Page 1, line 19.
Strike: "or"

4. Page 1, line 20.
Following: "in"
Strike: "a"
Strike: "JAIL OR"

5. Page 1, line 21.
Strike: "OTHER"
Insert: "an"
Following: "institution"
Insert: "other than a jail"

6. Page 1, line 23.
Strike: "JAIL,"
Following: "prison,"
Strike: ","

7. Page 1, line 24.
Following: "~~state~~"
Insert: "state"

THIRD READING OF BILLS

The following bills having been read three several times, title and history agreed to, were disposed of in the following manner:

SB 178 passed by the following vote:

Yeas: Aklestad, Bartlett, Beck, Bianchi, Blaylock, Brown, Bruski-Maus, Burnett, Christiaens, Crippen, Devlin, Doherty, Eck, Franklin, Gage, Grosfield, Hager, Halligan, Harding, Harp, Hertel, Hockett, Jacobson, Jergeson, Keating, Kennedy, Klampe, Koehnke, Lynch, McClernan, Mesaros, Nathe, Pipinich, Rea, Rye, Stang, Swift, Swysgood, Toews, Towe, Tveit, Vaughn, Waterman, Weeding, Weldon, Wilson, Yellowtail, Mr. President.
Total 48

Nays: None.
Total 0

Absent or not voting: None.
Total 0

Excused: Forrester, Fritz.
Total 2

SB 221 failed by the following vote:

Yeas: Bianchi, Christiaens, Crippen, Doherty, Eck, Forrester, Franklin, Fritz, Hager, Halligan, Harding, Hertel, Jergeson, Klampe, Koehnke, Rea, Stang, Towe, Vaughn, Waterman, Weeding, Weldon, Wilson, Yellowtail, Mr. President.
Total 25

Nays: Aklestad, Bartlett, Beck, Blaylock, Brown, Bruski-Maus, Burnett, Devlin, Gage, Grosfield, Harp, Hockett, Jacobson, Keating, Kennedy, Lynch, McClernan, Mesaros, Nathe, Pipinich, Rye, Swift, Swysgood, Toews, Tveit.
Total 25

Paired: Crippen, Forrester, Fritz, Aye; Beck, Lynch, Pipinich, No.

Absent or not voting: None.
Total 0

Excused: None.
Total 0

SB 222 passed by the following vote:

Yeas: Bartlett, Bianchi, Blaylock, Brown, Burnett, Christiaens, Doherty, Eck, Franklin, Fritz, Gage, Hager, Halligan, Hockett, Jacobson, Jergeson, Klampe, McClernan, Mesaros, Stang, Towe, Waterman, Weeding, Weldon, Wilson, Yellowtail, Mr. President.
Total 27

Nays: Aklestad, Beck, Bruski-Maus, Crippen, Devlin, Grosfield, Harding, Harp, Hertel, Keating, Kennedy, Koehnke, Lynch, Nathe, Pipinich, Rea, Rye, Swift, Swysgood, Toews, Tveit, Vaughn.
Total 22

Paired: Doherty, Fritz, Aye; Beck, Crippen, No.

Absent or not voting: None.
Total 0

Excused: Forrester.
Total 1

SB 231 passed by the following vote:

Yeas: Aklestad, Bartlett, Bianchi, Blaylock, Brown, Bruski-Maus, Christiaens, Crippen, Doherty, Eck, Franklin, Gage, Grosfield, Hager, Halligan, Harding, Harp, Hertel, Hockett, Jacobson, Jergeson, Keating, Kennedy, Klampe, Lynch, McClernan, Mesaros, Nathe, Pipinich, Rea, Rye, Stang, Swift, Toews, Towe, Vaughn, Waterman, Weeding, Weldon, Wilson, Yellowtail, Mr. President.
Total 42

Nays: Beck, Burnett, Devlin, Koehnke, Swysgood, Tveit.
Total 6

Absent or not voting: None.
Total 0

Excused: Forrester, Fritz.
Total 2

SB 264 passed by the following vote:

Yeas: Aklestad, Bartlett, Beck, Bianchi, Blaylock, Brown, Bruski-Maus, Burnett, Christiaens, Crippen, Devlin, Doherty, Eck, Franklin, Gage, Grosfield, Hager, Halligan, Harding, Harp, Hockett, Jacobson, Jergeson, Keating, Kennedy, Klampe, Koehnke, Lynch, McClernan, Mesaros, Nathe, Pipinich, Rea, Rye, Stang, Swift, Swysgood, Toews, Towe, Tveit, Vaughn, Waterman, Weeding, Weldon, Wilson, Yellowtail, Mr. President.
Total 47

Nays: None.
Total 0

Absent or not voting: Hertel.
Total 1

Excused: Forrester, Fritz.
Total 2

SB 268 passed by the following vote:

APPROVED BY COMM. ON
NATURAL RESOURCES

Senate BILL NO. 231

INTRODUCED BY Yellowtail

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING AND CLARIFYING THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO MONTANA WATER USE LAWS; CLARIFYING THE PROCESS FOR EXTENSION OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE OF A PERMIT; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-307, 85-2-308, 85-2-311, 85-2-312, 85-2-315, 85-2-316, 85-2-402, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

STATEMENT OF INTENT

A statement of intent is required for this bill because 85-2-312 grants the department of natural resources and conservation rulemaking authority to establish a procedure for extending time limits for completing work under a water use permit. The legislature intends that the department provide necessary procedural and substantive safeguards to protect existing water users and permitholders from adverse

LC 0233/01

THERE ARE NO CHANGES ON THIS BILL AND WILL NOT BE REPRINTED. PLEASE REFER TO INTRODUCED (WHITE) BILL FOR COMPLETE TEXT.

SB 231
SECOND READING

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **DICK KNOX, CHAIRMAN**, on March 10, 1993, at 3:00 pm.

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Rolph Tunby, Vice Chairman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Russ Fagg (R)
Rep. Gary Feland (R)
Rep. Mike Foster (R)
Rep. Bob Gilbert (R)
Rep. Hal Harper (D)
Rep. Scott Orr (R)
Rep. Bob Raney (D)
Rep. Dore Schwinden (D)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Howard Toole (D)
Rep. Doug Wagner (R)

Members Excused: None

Members Absent: None

Staff Present: Todd Everts, Environmental Quality Council
Michael Kakuk, Environmental Quality Council
Roberta Opel, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: **SR 24, SB 284, SB 282, SB 231**
Executive Action: **SB 284, SB 214, SB 319, SB 296, SB 282**

HEARING ON SJR 24

Opening Statement by Sponsor:

SEN. DON BIANCHI, SD 39, Belgrade, opened by stating that SJR 24, urges the Department of State Lands (DSL) to develop voluntary wildlife habitat management guidelines.

Proponents' Testimony:

Lorna Frank, Farm Bureau, stated the Bureau fully supported SB 282.

Holly Franz, Montana Power Company, spoke in support of the legislation.

Jo Brunner, Executive Director, Montana Water Resources Association, expressed the association's support for SB 282.

Bob Lane, Fish, Wildlife & Parks, supported the bill and noted the department's earlier concerns with other basin closure legislation. EXHIBIT 9

John Bloomquist, representing various water users in the Jefferson and Madison River Basins, stated his support for the bill. EXHIBIT 10

Gary Fritz, Department of Natural Resources, spoke in support of the legislation and noted the Jefferson and Madison River Basins have had serious water availability problems.

Opponents' Testimony: None.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

SEN. SWYSGOOD closed testimony on SB 282 and urged committee support.

HEARING ON SB 231

Opening Statement by Sponsor:

SEN. WILLIAM "BILL" YELLOWTAIL, SD 50, Wyola, opened testimony on SB 231, which would clarify the burdens of proof and standards of proof under which applications for beneficial water use permits, change authorizations, and reservations are processed pursuant to Montana water laws, and would clarify the process for extension of time for a water use permittee to complete conditions, and clarify the verification process for issuance.

Proponents' Testimony:

Don MacIntyre, Attorney, Montana Department of Natural Resources, presented technical data in support of the legislation. EXHIBIT 11

Opponents' Testimony: None.

Questions From Committee Members and Responses:

In response to a question from **REP. FELAND, Mr Fritz** noted this legislation would not affect water discharge permits, and would also not impact driller notification of water use applications.

Closing by Sponsor:

SEN. YELLOWTAIL closed by noting the legislation was a straightforward attempt to streamline the current process and make it more efficient.

EXECUTIVE ACTION ON SB 282

Motion/Vote: **REP GILBERT MOVED SB 282 BE CONCURRED IN.** Motion carried unanimously.

ADJOURNMENT

Adjournment: The meeting was adjourned at 8:15 pm.

DICK KNOX, Chairman

ROBERTA OPEL, Secretary

GAYLE CARPENTER, Transcriber

DK/ro

HOUSE OF REPRESENTATIVES
53RD LEGISLATURE - 1993
NATURAL RESOURCES COMMITTEE

ROLL CALL

DATE 3-10-93

NAME	PRESENT	ABSENT	EXCUSED
REP. DICK KNOX, CHAIRMAN	✓		
REP. ROLPH TUNBY, VICE CHAIRMAN	✓		
REP. JODY BIRD	✓		
REP. VIVIAN BROOKE	✓		
REP. RUSS FAGG	✓		
REP. GARY FELAND	✓		
REP. MIKE FOSTER	✓		
REP. BOB GILBERT	✓		
REP. HAL HARPER	✓		
REP. SCOTT ORR	✓		
REP. BOB RANEY	✓		
REP. DORE SCHWINDEN	✓		
REP. JAY STOVALL	✓		
REP. EMILY SWANSON	✓		
REP. HOWARD TOOLE	✓		
REP. DOUG WAGNER	✓		

HR:1993
wp.rollcall.man
CS-09

EXHIBIT 11
DATE 3-10-93
HB SB 231

TESTIMONY OF THE
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
ON SENATE BILL 231, FIRST READING

BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE

MARCH 10, 1993

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO MONTANA WATER LAWS; CLARIFYING THE PROCESS FOR EXTENSION OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE OF A PERMIT."

The Montana Department of Natural Resources and Conservation supports this legislation revising the Montana Water Use Act to clarify three basic administrative issues -- burdens of proof, extensions of time, and permit verification.

The first issue addressed by the legislation is that of clarifying the burdens of proof used in making decisions on applications for water use permits, changes in appropriation rights, and water reservations. This is accomplished by first defining what is meant by a "*correct and complete*" application. That is, an application in which all the blanks are filled in and the information supplied is considered a sufficient body of facts to cause the department to believe that the requested action should occur. The legislation goes on to require the submission of correct and complete applications for the various water filings involved -- permits, changes, and reservations as well as leases and objections.

Currently, and although the law requires the application of a "*substantial credible evidence*" standard, the department uses the "*preponderance of evidence*" standard when acting under the Water Use Act. This may be attributed to the fact that the substantial credible evidence standard is generally looked upon as a review standard -- one used by an appellate court when reviewing decisions of a lower court or administrative body. In contrast, the more appropriate preponderance of evidence standard is an evidentiary standard used by administrative decision-makers when weighing competing and contradictory evidence. Senate Bill 231 removes this confusing language regarding decision-making under the law by inserting the term "*preponderance of evidence*" in lieu of the current "*substantial credible evidence.*"

The final matter pertaining to the burden of proof issue concerns the evidence needed by an applicant to meet its burden to persuade the department that the criteria for issuance have been met. Although the law states the types of information needed,

it is confusing in its use of the term "*independent*" evidence. As presently interpreted, it means an applicant has to generate new and independent evidence even though existing information available from the department or other sources is perfectly acceptable. Senate Bill 231 addresses this matter by deleting the term "*independent*" and restructuring the subsection involved.

The second administrative matter addressed by this legislation concerns requests for extensions of time to comply with the conditions on permit and change authorizations. Senate Bill 231 provides for more efficient handling of requests for extensions of time through a process defined by rule rather than the present statutory mechanism. Consistent with the need to assure that the due process rights of existing water users are adequately safeguarded, it would allow the department to develop a process that provides more flexibility and efficiency in dealing with time extension requests. As an example, rather than provide notice by means of newspaper publication as now required by law, the department could individually notice only those parties having a potential concern with a time extension request. The proposed amendment would also reduce the need for extenuated hearings by establishing standards for what constitutes "*due diligence*" in putting permitted water to use. This might involve setting forth specific conditions on new permit or change authorizations that specify how any subsequent time extension requests would be handled. In doing so, it would advise all water right holders on a stream of the criteria the department will use in acting on requests for time extensions. In turn, this would eliminate the need to re-notice the action at the time any such request is actually made and reduce the need for extenuated hearings.

The third and final focus of this legislation is the process for verifying if the terms and conditions of a permit or change authorization have been met. Currently, the statute allows parties other than the department to certify if on-the-ground water use is in "*substantial compliance*" with a permit or change authorization. However, the ultimate determination of substantial compliance must be made by the department. Senate Bill 231 addresses the matter by continuing to allow outside parties to conduct the field verification effort. But, rather than assess the matter of substantial compliance, they would certify or document what has taken place on the ground. In turn, the department would use this information to determine if the use is in substantial compliance with the authorization. Along with this amendment, the legislation will also allow the department to use current rule making authority to specify the substance of the field report that needs to be prepared and thereby better assure that qualified persons prepare the needed documentation.

EXHIBIT 11
DATE 3-10-93
SB 231

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

MARC RACICOT, GOVERNOR

LEE METCALF BUILDING
1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699
TELEFAX NUMBER (406) 444-6721

PO BOX 202301
HELENA, MONTANA 59620-2301

MEMORANDUM

FROM: Donald D. MacIntyre
Chief Legal Counsel

TO: Senator Lorents Grosfield

RE: Senate Bill No. 231
Burden of Proof and
Interpretation of term "substantial credible evidence"

DATE: March 3, 1993

BURDEN OF PROOF

The burden of proof embodies two concepts as an evidentiary standard: (1) the burden of production -- the burden of going forward with evidence to convince the decision maker that you should be believed; and,

(2) the burden of persuasion -- the burden of convincing the decision maker that you should ultimately win the case because your evidence meets the requisite standard of proof.

NOTE: The burden of production shifts from one party to the other depending on whose duty it is to present the evidence [for example, once a plaintiff has completed his case the burden shifts to the defendant to produce evidence to establish the defense]. The burden of persuasion never shifts [for example, the plaintiff is required to convince the judge by some set standard (see standards below) that he should prevail, if he doesn't meet the standard the plaintiff loses].

In modern judicial proceedings, three standards of proof are generally recognized:

(1) preponderance of the evidence -- this standard is used in most every civil case [evidence which, when fairly considered produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition, but does not necessarily mean the greater number of witnesses];

(2) clear and convincing evidence -- this standard is reserved to protect particularly important interests in a limited number of civil cases [a high standard requiring strong evidence that produces in the mind of the court a firm belief or conviction, but is less than conclusive]; and,

(3) beyond a reasonable doubt -- this standard is used exclusively in criminal cases [Highest standard of proof].

Confusion exists in the Montana water law because the standard "substantial credible evidence" is used. Terms such as substantial and substantial credible are generally terms used by a reviewing court. For example, the Montana Supreme Court reviews decisions of a district court and upholds the district court if there exists substantial evidence in the record of the district court to uphold the decision. Remember, however, that the district court in making its decision used the standard of a preponderance of the evidence (in most civil cases). The standards of substantial credible and preponderance of the evidence serve two different functions-- substantial credible to review a case on appeal, and preponderance to weigh the conflicting evidence by the initial decision maker. Unfortunately, the standard for the decision maker in the water laws has been set as "substantial credible" (the reviewing standard) therefore, the question naturally arises as to whether substantial credible is higher or lower than preponderance of the evidence. It appears that arguments may be made on both sides of the issue, but the department in dealing with the issue in water permitting matters is utilizing "preponderance of evidence" as being embodied in the "substantial credible" standard.

Senate Bill No. 231, introduced at the request of the Department of Natural Resources and Conservation, is intended to clarify the existing law to conform to the agency's interpretation. The bill does not change existing law by increasing the burden of proof on either an applicant or objector.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By CHAIRMAN DICK KNOX, on March 12, 1993, at 3:00 p.m.

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Rolph Tunby, Vice Chairman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Russ Fagg (R)
Rep. Gary Feland (R)
Rep. Mike Foster (R)
Rep. Bob Gilbert (R)
Rep. Hal Harper (D)
Rep. Scott Orr (R)
Rep. Bob Raney (D)
Rep. Dore Schwinden (D)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Howard Toole (D)
Rep. Doug Wagner (R)

Members Excused: None

Members Absent: None

Staff Present: Todd Everts, Environmental Quality Council
Michael Kakuk, Environmental Quality Council
Roberta Opel, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 261, SB 104 and SB 171
Executive Action: SB 104, SB 231, SJR 24

HEARING ON SB 261

Opening Statement by Sponsor:

SEN. STEVE DOHERTY, SD 20, Great Falls, presented SB 261 which revises Montana Subdivision law. The bill defines minor subdivisions which are five or fewer acre parcels and differs, therefore, from **REP. FAGG'S** bill, HB 408. SB 261 removes both the 20 acre exemption and the occasional sale.

REP. STOVALL asked if the resolution covers all stream sites. He said the bill is unnecessary.

REP. FAGG said he will support SJR 24 because whatever work the DSL conducts will be voluntary.

REP. SCHWINDEN said he has found that negotiation, rather than litigation, produces the best result for the state and its citizenry.

REP. GILBERT commented that often voluntary becomes mandatory.

REP. TOOLE said **REP. GILBERT** is arguing against himself.

REP. GILBERT moved his amendments to SJR 24. **EXHIBIT 7** The amendments will strike DSL and insert forestry service.

REP. RANEY said he believes the amendment strikes a good compromise.

REP. HARPER said the amendments will increase timber harvesting.

REP. ORR said he supports the amendments.

REP. BROOKE said she would like to see the word education inserted in the bill.

REP. GILBERT said he prefers the amendments remain as proposed.

Motion/Vote: **TO ADOPT REP. GILBERT'S AMENDMENTS.** Motion carried unanimously.

Motion/Vote: **MOTION THAT SJR 24 BE CONCURRED IN AS AMENDED.** Motion carried 12 to 4 with **REPS. BIRD, FOSTER, WAGNER and FELAND** opposing the bill.

EXECUTIVE ACTION ON SB 231

Motion: **REP. FAGG MOVED THAT SB 231 BE CONCURRED IN.**

Discussion: **REP. GILBERT** asked to have SB 231 explained to him as he missed parts of the initial hearing.

Michael Kakuk, legal counsel, explained that language in the bill has been changed to substantial, credible evidence. The new language in SB 231 attempts to clear up language discrepancy.

Motion/Vote: **SB 231 BE CONCURRED IN.** Motion carrieD 15 to 1 with **REP. GILBERT** abstaining.

HOUSE OF REPRESENTATIVES

Natural Resources COMMITTEE

BILL NO.

ROLL CALL

DATE 2-12-93

NAME	AYE	NO	
Jody Bird	✓		
Vivian Brooke	✓		
Rugg Fagg	✓		
Gary Feland	✓		
Mike Foster	✓		
Bob Gilbert	✓		
Hal Harper	✓		
Scott Orr	✓		
Bob Raney	✓		
Dore Schwinden	✓		
Jay Stovall	✓		
Emily Swanson	✓		
Howard Toole	✓		
Doug Wagner	✓		
Rolph Tunby, Vice Chairman	✓		
Dick Knox, Chairman	✓		

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HOUSE STANDING COMMITTEE REPORT

March 15, 1993

Mr. Speaker: We, the committee on Natural Resources report that Senate BIll 231 (third reading copy -- blue) be concurred in .

Signed: _____
Dick Knox, Chair

Carried by: Rep. Brooke

Committee Vote:
Yes ___, No ___.

581003SC.Hpf

SECOND READING OF BILLS
(COMMITTEE OF THE WHOLE)

Representative Grinde moved the House resolve itself into a Committee of the Whole for consideration of business on second reading. Motion carried. Representative Cocchiarella in the Chair.

Mr. Speaker: We, your Committee of the Whole, having had under consideration business on second reading, recommend as follows:

SB 73 - Representative Rehbein moved consideration of SB 73 be passed for the day. Motion carried.

Representative Grinde moved the House recess until 1:00 p.m. Motion carried.

House recessed at 11:58 a.m.

House reconvened at 1:04 p.m. Representative Cocchiarella in the Chair.

Representative Ellis present at this time.

SB 15 - Representative Vogel moved SB 15, third reading copy, be amended as follows (amendment #1):

1. And, that such amendments to the House Judiciary Committee amendments of March 12, 1993 be amended as follows:

Committee amendment item #3.
Strike: amendment #3 in its entirety

2. And, that Senate Bill 15 (third reading copy--blue) be further amended as follows:

Page 2, line 11.
Following: line 10
Insert: "(6) After a grievance has been filed, the grievant and the exclusive representative waive any right to pursue any action or complaint involving the same facts or circumstances before any local, state, or federal agency, tribunal, court, or other forum in which relief may be sought or granted. If a grievant or the exclusive representative files a complaint, appeal, or other action with a local, state, or federal agency, tribunal, court, or other forum involving the same facts or circumstances, a grievance may not be filed or pursued under this section."

[Coordination instruction. If this amendment and the Vogel Committee of the Whole amendment dated march 17, 1993, 12:16 p.m. both pass, the language inserted above is intended to be subsection (m) of subsection (6). PRF]

Amendment #1 passed as follows:

Squires, Stanford, Strizich, Swanson, Toole, Tuss, Vogel, Wanzenried, Whalen, Winslow, Wiseman, Wyatt, Mr. Speaker.
Total 69

Noes: Anderson, Barnett, Benedict, Bergman, Bergsagel, DeBruycker, Ellis, Foster, Gilbert, Grady, Grinde, H.S. Hanson, M. Hanson, Hayne, Kasten, Keller, Knox, Mills, L. Nelson, Orr, Peterson, Rehbein, Rose, Sayles, Spring, Stovall, Tash, Tunby, Wagner, Wallin, Zook.
Total 31

Excused: None.
Total 0

Absent or not voting: None.
Total 0

SB 231 - Representative Brooke moved SB 231 be concurred in. Motion carried as follows:

Ayes: Bachini, Bardanouve, Barnett, Barnhart, Benedict, Bird, Bohlinger, Brandewie, Brooke, Brown, Cocchiarella, Daily, Davis, Dolezal, Dowell, Driscoll, Elliott, Endy, Ewer, Fagg, Fisher, Foster, Galvin, Gervais, Grady, Grimes, Hansen, M. Hanson, Harper, Harrington, Hibbard, J. Johnson, R. Johnson, Kadas, Keller, Knox, Larson, McCaffree, McCarthy, McCulloch, Menahan, Mills, L. Nelson, T. Nelson, Orr, Pavlovich, Peck, Quilici, Raney, Ream, J. Rice, S. Rice, Rose, Russell, Ryan, Sayles, Schwinden, Schye, Simon, Squires, Stanford, Stovall, Strizich, Swanson, Toole, Tunby, Tuss, Vogel, Wallin, Wanzenried, Whalen, Winslow, Wiseman, Wyatt, Zook, Mr. Speaker.
Total 76

Noes: Anderson, Bergman, Bergsagel, Boharski, Clark, Cobb, DeBruycker, Ellis, Feland, Gilbert, Grinde, H.S. Hanson, Hayne, Herron, Kasten, Mason, Molnar, Peterson, Rehbein, Simpkins, Smith, Spring, Tash, Wagner.
Total 24

Excused: None.
Total 0

Absent or not voting: None.
Total 0

SB 249 - Representative Bachini moved SB 249 be concurred in. Motion carried as follows:

Ayes: Anderson, Bachini, Bardanouve, Barnett, Barnhart, Benedict, Bergman, Bergsagel, Bird, Boharski, Bohlinger, Brandewie, Brooke, Brown, Clark, Cobb, Cocchiarella, Daily, Davis, Dolezal, Dowell, Elliott, Ellis, Endy, Ewer, Fagg, Feland, Fisher, Foster, Galvin, Gervais, Grady, Grimes, Hansen, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Herron, Hibbard, J. Johnson, R. Johnson, Kadas, Kasten, Keller, Larson, Mason, McCaffree, McCarthy, McCulloch, Menahan, Mills, Molnar, L. Nelson, T. Nelson, Pavlovich, Peck, Peterson, Quilici, Raney, Ream, Rehbein, J. Rice,

THIRD READING OF BILLS

The following bills having been read three several times, title and history agreed to, were disposed of in the following manner:

SB 15 concurred in as follows:

Ayes: Bachini, Bardanouve, Barnhart, Bird, Bohlinger, Brandewie, Brooke, Brown, Cocchiarella, Daily, Davis, Dolezal, Dowell, Driscoll, Elliott, Endy, Ewer, Fagg, Galvin, Gervais, Grady, Grinde, Hansen, Harper, Harrington, Hibbard, J. Johnson, Kadas, Larson, McCaffree, McCarthy, McCulloch, Molnar, T. Nelson, Pavlovich, Peck, Quilici, Raney, Ream, J. Rice, S. Rice, Russell, Ryan, Sayles, Schwinden, Schye, Simon, Simpkins, Squires, Stanford, Stovall, Strizich, Swanson, Tash, Toole, Tuss, Wiseman, Wyatt, Mr. Speaker.
Total 59

Noes: Anderson, Barnett, Benedict, Bergman, Bergsagel, Boharski, Clark, Cobb, DeBruycker, Ellis, Feland, Fisher, Foster, Gilbert, Grimes, H.S. Hanson, M. Hanson, Hayne, Herron, R. Johnson, Kasten, Keller, Knox, Mason, Mills, L. Nelson, Orr, Peterson, Rehbein, Rose, Smith, Spring, Tunby, Vogel, Wagner, Wallin, Wanzenried, Winslow, Zook.
Total 39

Excused: Whalen.
Total 1

Absent or not voting: Menahan.
Total 1

SB 39 concurred in as follows:

Ayes: Anderson, Bardanouve, Barnett, Benedict, Bergman, Bergsagel, Boharski, Bohlinger, Brandewie, Clark, Cobb, DeBruycker, Elliott, Ellis, Ewer, Fagg, Feland, Fisher, Foster, Gilbert, Grady, Grimes, Grinde, Hansen, H.S. Hanson, M. Hanson, Harper, Hayne, Herron, Hibbard, J. Johnson, R. Johnson, Kadas, Kasten, Keller, Knox, Mason, Mills, Molnar, L. Nelson, T. Nelson, Orr, Peck, Peterson, Rehbein, J. Rice, Rose, Sayles, Schwinden, Simon, Simpkins, Spring, Stovall, Tash, Toole, Tunby, Vogel, Wagner, Wallin, Winslow, Wiseman, Zook, Mr. Speaker.
Total 63

Noes: Bachini, Barnhart, Bird, Brooke, Brown, Cocchiarella, Daily, Davis, Dolezal, Dowell, Driscoll, Endy, Galvin, Gervais, Harrington, Larson, McCaffree, McCarthy, McCulloch, Menahan, Pavlovich, Quilici, Raney, Ream, S. Rice, Russell, Ryan, Schye, Smith, Squires, Stanford, Strizich, Swanson, Tuss, Wanzenried, Wyatt.
Total 36

Excused: Whalen.
Total 1

Absent or not voting: None.

Gervais, Grady, Grimes, Hansen, Harper, Harrington, Hibbard, J. Johnson, R. Johnson, Kadas, Larson, Mason, McCaffree, McCarthy, McCulloch, Molnar, T. Nelson, Pavlovich, Peck, Quilici, Raney, Ream, J. Rice, S. Rice, Russell, Ryan, Sayles, Schwinden, Schye, Simon, Simpkins, Smith, Squires, Stanford, Stovall, Strizich, Swanson, Tash, Toole, Tuss, Vogel, Wanzenried, Wiseman, Wyatt, Mr. Speaker.
Total 69

Noes: Anderson, Barnett, Benedict, Bergman, Bergsagel, Clark, DeBruycker, Ellis, Gilbert, Grinde, H.S. Hanson, M. Hanson, Hayne, Herron, Kasten, Keller, Knox, Mills, L. Nelson, Orr, Peterson, Rehbein, Rose, Spring, Tunby, Wagner, Wallin, Winslow, Zook.
Total 29

Excused: Whalen.
Total 1

Absent or not voting: Menahan.
Total 1

SB 231 concurred in as follows:

Ayes: Anderson, Bachini, Bardanouve, Barnett, Barnhart, Bergman, Bird, Bohlinger, Brandewie, Brooke, Brown, Cobb, Cocchiarella, Daily, Davis, Dolezal, Dowell, Driscoll, Elliott, Ellis, Endy, Ewer, Fagg, Fisher, Foster, Galvin, Gervais, Grady, Grimes, Hansen, H.S. Hanson, M. Hanson, Harper, Harrington, Hibbard, J. Johnson, R. Johnson, Kadas, Knox, Larson, McCaffree, McCarthy, McCulloch, Menahan, Mills, Molnar, L. Nelson, T. Nelson, Pavlovich, Peck, Quilici, Raney, Ream, J. Rice, S. Rice, Russell, Ryan, Sayles, Schwinden, Schye, Simon, Simpkins, Squires, Stanford, Stovall, Strizich, Swanson, Tash, Toole, Tunby, Tuss, Vogel, Wallin, Wanzenried, Winslow, Wiseman, Wyatt, Zook, Mr. Speaker.
Total 79

Noes: Benedict, Bergsagel, Boharski, Clark, DeBruycker, Feland, Gilbert, Grinde, Hayne, Herron, Kasten, Keller, Mason, Orr, Peterson, Rehbein, Rose, Smith, Spring, Wagner.
Total 20

Excused: Whalen.
Total 1

Absent or not voting: None.
Total 0

SB 249 concurred in as follows:

Ayes: Anderson, Bachini, Bardanouve, Barnett, Barnhart, Benedict, Bergman, Bergsagel, Bird, Boharski, Bohlinger, Brandewie, Brooke, Brown, Cobb, Cocchiarella, Daily, Davis, Dolezal, Dowell, Driscoll, Elliott, Ellis, Endy, Ewer, Fagg, Feland, Fisher, Foster, Galvin, Gervais, Grady, Grimes, Hansen, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Herron, Hibbard, J. Johnson, R. Johnson, Kadas, Kasten, Keller, Larson, Mason,

SENATE BILL NO. 231

INTRODUCED BY YELLOWTAIL

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING AND CLARIFYING THE BURDENS OF PROOF AND STANDARDS OF PROOF UNDER WHICH APPLICATIONS FOR BENEFICIAL WATER USE PERMITS, CHANGE AUTHORIZATIONS, AND RESERVATIONS ARE PROCESSED PURSUANT TO MONTANA WATER USE LAWS; CLARIFYING THE PROCESS FOR EXTENSION OF TIME FOR A WATER USE PERMITTEE TO COMPLETE PERMIT CONDITIONS; CLARIFYING THE VERIFICATION PROCESS FOR ISSUANCE OF A PERMIT; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-307, 85-2-308, 85-2-311, 85-2-312, 85-2-315, 85-2-316, 85-2-402, AND 85-2-436, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

STATEMENT OF INTENT

A statement of intent is required for this bill because 85-2-312 grants the department of natural resources and conservation rulemaking authority to establish a procedure for extending time limits for completing work under a water use permit. The legislature intends that the department provide necessary procedural and substantive safeguards to protect existing water users and permitholders from adverse impacts that may be caused by extending time limits for perfecting new water uses.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"**85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(7) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(7)~~(8) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(8)~~(9) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(9)~~(10) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(10)~~(11) "Ground water" means any water that is beneath the ground surface.

~~(11)~~(12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(12)~~(13) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(13)~~(14) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(14)~~(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "Substantial credible information" means probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(15)~~(17) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(16)~~ (18) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(17)~~ (19) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other manmade waterways.

~~(18)~~ (20) "Water division" means a drainage basin as defined in 3-7-102.

~~(19)~~ (21) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(20)~~ (22) "Water master" means a master as provided for in Title 3, chapter 7.

~~(21)~~ (23) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-102. (Effective July 1, 1999) Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in

accordance with 85-2-316.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; and

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(6)~~ (7) "Declaration" means the declaration of an existing right filed with the department under section 8,

Chapter 452, Laws of 1973.

~~(7)~~(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)~~(9) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

~~(9)~~(10) "Ground water" means any water that is beneath the ground surface.

~~(10)~~(11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(11)~~(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(12)~~(13) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(13)~~(14) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(15) "Substantial credible information" means probable

believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(14)~~(16) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(15)~~(17) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(16)~~(18) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other manmade waterways.

~~(17)~~(19) "Water division" means a drainage basin as defined in 3-7-102.

~~(18)~~(20) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(19)~~(21) "Water master" means a master as provided for in Title 3, chapter 7.

~~(20)~~(22) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-302, MCA, is amended to read:

"85-2-302. (Temporary) Application for permit -- fee. (1) Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated.

(2) In addition to the application filing fee

prescribed by the board by rule pursuant to 85-2-113, a person applying for a permit under subsection (1) shall pay a fee of $1 per acre-foot of ground water appropriated. The fees collected by the department under this subsection must be deposited in the ground water assessment account, established in 85-2-905, within the state special revenue fund. (Terminates July 1, 1993--sec. 22, Ch. 769, L. 1991.)

85-2-302. (Effective July 1, 1993) Application for permit. Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The applicant shall submit a correct and complete application. The department shall return a defective application for correction or completion, together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a

further time as the department allows, up to 3 months, the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 3 months shall be terminated."

Section 3. Section 85-2-307, MCA, is amended to read:

"85-2-307. **Notice of application.** (1) (a) Upon receipt of a proper correct and complete application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice once in a newspaper of general circulation in the area of the source.

(b) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

(c) The department may, in its discretion, also serve notice upon any state agency or other person the department

feels may be interested in or affected by the proposed appropriation.

(d) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than 15 days or more than 60 days after the date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

Section 4. Section 85-2-308, MCA, is amended to read:

"85-2-308. **Objections.** (1) (a) An objection to an application for a permit must be filed by the date specified by the department under 85-2-307(2).

(b) The objection to an application for a permit must state the name and address of the objector and facts tending to show that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the

objector and facts tending to show that one or more of the criteria in 85-2-402 are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts tending to show that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall timely file a correct and complete objection on a form prescribed by the department."

Section 5. Section 85-2-311, MCA, is amended to read:

"**85-2-311. Criteria for issuance of permit.** (1) Except as provided in subsections (2) and (3), the department shall issue a permit if the applicant proves by ~~substantial credible~~ a preponderance of evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

(i) the existing demands on the state water supply, as

well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are

not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) To meet the ~~substantial-credible~~ preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit ~~independent~~ hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies~~,--demonstrating--that--the criteria-are-met~~.

(5) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or

assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 6. Section 85-2-316, MCA, is amended to read:

"**85-2-316. Reservation of waters.** (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at periods or for a length of time as the board designates.

(2) (a) Water may be reserved for existing or future beneficial uses in the basin where it is reserved, as described by the following basins:

(i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;

(ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;

(iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;

(iv) the Little Missouri River and its tributaries to

its confluence with Lake Sakakawea in North Dakota;

(v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

(vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

(b) A water reservation may be made for an existing or future beneficial use outside the basin where the diversion occurs only if stored water is not reasonably available for water leasing under 85-2-141 and the proposed use would occur in a basin designated in subsection (2)(a).

(3) Upon receiving ~~an~~ a correct and complete application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, must be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement must be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

(4) (a) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction

of the board by a preponderance of evidence:

(i) the purpose of the reservation;

(ii) the need for the reservation;

(iii) the amount of water necessary for the purpose of the reservation;

(iv) that the reservation is in the public interest.

(b) In determining the public interest under subsection (4)(a)(iv), the board may not adopt an order reserving water for withdrawal and transport for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(ii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4)(b)(i) and (4)(b)(ii) are met, the board shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a reservation to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, use, and reservation of water.

(5) If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board by a preponderance of evidence that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(6) The board shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the board.

(7) After the adoption of an order reserving waters, the department may reject an application and refuse a permit

for the appropriation of reserved waters or may, with the approval of the board, issue the permit subject to terms and conditions it considers necessary for the protection of the objectives of the reservation.

(8) (a) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for the use with the district, and the district, upon approval of the application, shall inform the department of the approved use and issue the applicant an authorization for the use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

(b) Upon actual application of water to the proposed beneficial use the authorized user shall notify the

conservation district. The notification must contain a certified statement by a person with experience in the design, construction, or operation of project works for agricultural purposes ~~that~~ describing how the reserved water ~~has--been~~ was put to use ~~in-substantial-accordance-with-the terms-and-conditions-of-the-authorization--to--use--reserved~~ water. The department or the district may then inspect the appropriation to determine if it has been completed in substantial accordance with the authorization.

(9) Except as provided in 85-2-331, the priority of appropriation of a water reservation and the relative priority of the reservation to permits with a later priority of appropriation must be determined according to this subsection (9).

(a) A reservation under this section has a priority of appropriation dating from the filing with the department of a notice of intention to apply for a water reservation in a basin in which no other notice of intention to apply is currently pending. The notice of intention to apply must specify the basin in which the applicant is seeking a reservation.

(b) Upon receiving a notice of intention to apply for a water reservation, the department shall identify all potential water reservation applicants in the basin specified in the notice and notify each potential applicant

of the opportunity to submit an application and to receive a reservation with the priority of appropriation as described in subsection (9)(a).

(c) To receive the priority of appropriation described in subsection (9)(a), the applicant shall submit a correct and complete water reservation application within 1 year after the filing of the notice of intention to apply. Upon a showing of good cause, the board may extend the time for preparing the application.

(d) The board may by order subordinate a water reservation to a permit issued pursuant to this part if:

(i) the permit application was accepted by the department before the date of the board order granting the reservation; and

(ii) the effect of subordinating the reservation to one or more permits does not interfere substantially with the purpose of the reservation.

(e) The board shall by order establish the relative priority of reservations approved under this section that have the same day of priority. A reservation may not adversely affect any rights in existence at that time.

(10) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board

may extend, revoke, or modify the reservation. Any undeveloped water made available as a result of a revocation or modification under this subsection is available for appropriation by others pursuant to this part.

(11) The board may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate the reservation or portion of the reservation to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water may not adversely affect the priority date of the reservation, and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

(12) A reservant may not make a change in a reservation under this section except as permitted under 85-2-402 and this subsection. If the department approves a change, the board, upon notification by the department of its approval,

shall give notice and require the reservant to establish that the criteria in subsection (4) will be met under the approved change.

(13) A reservation may be transferred to another entity qualified to hold a reservation under subsection (1). Only the entity holding the reservation may initiate a transfer. The transfer occurs upon the filing of a water right transfer certificate with the board together with an affidavit from the entity receiving the reservation establishing that the entity is a qualified reservant under subsection (1), that the entity agrees to comply with the requirements of this section and the conditions of the reservation, and that the entity can meet the objectives of the reservation as granted. If the transfer of a reservation involves a change in an appropriation right, the necessary approvals must be acquired pursuant to subsection (12).

(14) Nothing in this section vests the board with the authority to alter a water right that is not a reservation.

(15) The department shall undertake a program to educate the public, other state agencies, and political subdivisions of the state as to the benefits of the reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical assistance to other state agencies and political subdivisions in applying for reservations under this section.

(16) Water reserved under this section is not subject to the state water leasing program established under 85-2-141."

Section 7. Section 85-2-402, MCA, is amended to read:

"85-2-402. (Temporary) Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except, as permitted under this section, ~~and with~~ by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by ~~substantial credible~~ a preponderance of evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest,

in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by ~~substantial credible~~ a preponderance of evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are

not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the

proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that a change might adversely affect the rights of other persons.

(7) The department or the legislature, if applicable, may approve a change subject to terms, conditions,

restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(8) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been ~~properly~~ completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works ~~that~~ describing how the appropriation ~~has-been-properly~~ was completed ~~in--substantial--accordance--with--the--terms--and conditions-of-the-change-approval~~.

(9) If a change is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(10) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(11) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(12) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)

85-2-402. (Effective July 1, 1999) Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except, as permitted under this section, ~~and with~~ by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by ~~substantial--credible~~ a preponderance of evidence that the following criteria are

met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(3) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by ~~substantial credible~~ a preponderance of evidence that:

(a) the criteria in subsection (2) are met;

(b) the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as

well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (3) are met; and

(b) the department then petitions the legislature and the legislature affirms the decision of the department after

one or more public hearings.

(5) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(b) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not

otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (5)(b)(ii) and (5)(b)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(6) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and

5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department shall provide notice and may hold one or more hearings upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

(7) The department or the legislature, if applicable, may approve a change subject to such terms, conditions, restrictions, and limitations as it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change. The department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3).

(8) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been ~~properly~~ completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works ~~that~~ describing how the appropriation ~~has-been-properly~~ was completed ~~in--substantial--accordance--with--the--terms--and conditions-of-the-change-approval~~.

(9) If a change is not completed as approved by the

department or legislature or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(10) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(11) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

(12) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section."

Section 8. Section 85-2-436, MCA, is amended to read:

"**85-2-436. (Temporary) Water leasing study.** (1) The

department of fish, wildlife, and parks and the department, in consultation with the water policy committee, shall conduct and coordinate a study that, at a minimum:

(a) provides the following data for each designated stream reach and each pilot lease entered into under subsection (2):

(i) the length of the stream reach and how it is determined;

(ii) technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;

(iii) legal standards and technical data used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;

(iv) contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering; and

(v) methods and technical means used to monitor use of water under each lease;

(b) based on the data provided under subsection (1)(a), develops a complete model of a water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.

(2) For purposes of undertaking the study described in subsection (1) and as authorized by law, the department of

fish, wildlife, and parks and the department may engage in the activities described in this subsection. For purposes of this study, this section is the exclusive means by which the department of fish, wildlife, and parks may seek to change an appropriation right to an instream flow purpose.

(a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in stream reaches determined eligible by the board pursuant to 85-2-437.

(b) Upon receipt of ~~an~~ a correct and complete application for a lease from the department of fish, wildlife, and parks, the department shall publish notice of the application as provided in 85-2-307. Parties who believe they may be adversely affected by the proposed lease may file an objection as provided in 85-2-308. A lease may not be approved until all objections are resolved. After resolving all objections filed under 85-2-308, the department shall authorize a lease of an existing right for the purpose of maintaining or enhancing streamflows for the benefit of fisheries if the applicant submits a correct and complete application and meets the requirements of 85-2-402.

(c) The application for a lease authorization must include specific information on the length and location of the stream reach in which the streamflow must be maintained

or enhanced and must provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow must be measured.

(d) The maximum quantity of water that may be leased is the amount historically diverted by the lessor. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows below the lessor's point of diversion.

(e) The lease may not be issued for a term of more than 10 years, but it may be renewed once for up to 10 years, except that a lease of water made available from the development of a water conservation or storage project is restricted to a term of not more than 20 years. Upon receiving notice of a lease renewal, the department shall notify other appropriators potentially affected by the lease and shall allow 30 days for submission of new evidence of adverse effects to other water rights. A lease authorization is not required for a renewal unless an appropriator other than an appropriator described in subsection (2)(i) submits evidence of adverse effects to ~~his~~ the appropriator's rights that has not been considered previously. If new evidence is submitted, a lease authorization must be obtained according to the requirements of 85-2-402.

(f) During the term of the lease, the department may

modify or revoke the lease authorization if an appropriator other than an appropriator described in subsection (2)(i) proves by ~~substantial credible~~ a preponderance of evidence that ~~his~~ the appropriator's water right is adversely affected.

(g) The priority of appropriation for a lease under this section is the same as the priority of appropriation of the right that is leased.

(h) Neither a change in appropriation right nor any other authorization is required for the reversion of the appropriation right to the lessor's previous use.

(i) A person issued a water use permit with a priority of appropriation after the date of filing of an application for a lease authorization under this section may not object to the exercise of the lease according to its terms or the reversion of the appropriation right to the lessor according to the lessor's previous use.

(j) The department of fish, wildlife, and parks shall pay all costs associated with installing devices or providing personnel to measure streamflows according to the measuring plan submitted under this section.

(3) (a) The department of fish, wildlife, and parks shall complete and submit to the board, commission, and water policy committee an annual study progress report by December 1 of each year. This report must include the

applicable information listed in subsection (1) for each lease. If the department of fish, wildlife, and parks has not leased water rights under this section by December 1 of any year, the department of fish, wildlife, and parks shall provide compelling justification for that fact in the study progress report.

(b) A final study report must be adopted by the board and commission and submitted to the water policy committee, which shall complete the final report by December 1, 1998.

(4) This section does not create the right for a person to bring suit to compel the renewal of a lease that has expired. (Terminates June 30, 1999--sec. 4, Ch. 740, L. 1991.)"

Section 9. Section 85-2-312, MCA, is amended to read:

"**85-2-312. Terms of permit.** (1) The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311, and it may issue temporary or seasonal permits. A permit shall be issued

subject to existing rights and any final determination of those rights made under this chapter.

(2) The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. The department shall issue the permit or authorized extension of time subject to the terms, conditions, restrictions, and limitations it considers necessary to ensure that the work on the appropriation is commenced, conducted, and completed and that the water is actually applied in a timely manner to the beneficial use specified in the permit.

~~(3) The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the~~

~~expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party. The department may grant the extension of time in the absence of a hearing if no requests for a hearing are received and the extension of time is granted as requested, or the department may grant the extension of time in a modified form by following the process established in 85-2-310(2). Subsequent extensions of time may be made in the same manner.~~ The department shall by rule or by condition to a permit establish a process allowing for the extension of the time limits specified in the permit for commencement of the appropriation works, completion of

construction, and actual application of water to the proposed beneficial use. The department may not accept a request for extension of time that is filed less than 30 days prior to the time limit specified in the permit. If a permit is not completed within the time limit specified or within an extension of that time limit the permit is void upon lapse of the time limit.

(4) The original of the permit shall be sent to the permittee, and a copy shall be kept in the office of the department in Helena."

Section 10. Section 85-2-315, MCA, is amended to read:

"**85-2-315. Certificate of water right.** Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been ~~properly~~ completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works ~~that~~ describing how the appropriation ~~has--been~~ was ~~properly~~ completed ~~in-substantial-accordance with-the-terms-and-conditions-of-the-permit~~. The department shall review the certified statement and may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be

sent to the permittee, and a duplicate shall be kept in the office of the department in Helena."

NEW SECTION. **Section 11. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 12. Retroactive applicability.** [Sections 1 through 8] apply retroactively, within the meaning of 1-2-109, to all applications and objections pending on [the effective date of this act] that are subject to the provisions of Title 85, chapter 2.

NEW SECTION. **Section 13. Effective date.** [This act] is effective on passage and approval.

-End-